APPEAL NO. 93453

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). On April 22, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer determined that the appellant, claimant herein, did not sustain an injury in the course and scope of his employment (date of injury). Claimant appeals, generally disagreeing with the hearing officer's decision and contending the hearing officer failed to give enough weight to claimant's testimony and evidence. Respondent, carrier herein, responds asserting claimant's appeal was not timely or in the alternative that the decision is supported by the evidence and requests we affirm the decision.

DECISION

Finding that the appeal in this matter was not timely filed as required by Article 8308-6.41(a), the decision of the hearing officer is the final administrative decision in this case. See Article 8308-6.34(h) of the 1989 Act.

The decision of the hearing officer was distributed, by mail, on May 5, 1993. Claimant in his appeal does not assert when the decision was received, therefore, the provisions of Commission Rule 102.5(h) (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) are invoked. Rule 102.5(h) provides:

(h)For purposes of determining the date of receipt for those notices and other written communications which require action by a date specific after receipt, the commission shall deem the received date to be five days after the date mailed.

In that the decision was mailed on May 5, 1993, the "deemed" date of receipt is May 10, 1993. Article 8308-6.41(a) requires that an appeal shall be filed with the Appeals Panel "not later than the 15th day after the date on which the decision of the hearing officer is received. . . ." If the deemed receipt date is May 10, 1993, 15 days from that date would be Tuesday, May 25, 1993, which would be the statutory date by which an appeal must be filed. Claimant's appeal was undated but postmarked June 1, 1993. The appeal was actually received by the Texas Workers' Compensation Commission's central office in Austin on June 4, 1993. Consequently, the appeal was filed beyond the statutory 15 days accorded in Article 8308-6.41(a), using either the date on the certificate of service (May 28th) or the post-marked date of June 1st as the date of mailing pursuant to Rule 143.3(c)(1).

Article 8308-6.34(h) states the decision of the hearing officer is final in the absence of a timely appeal. Determining the appeal was not timely filed, as set forth above, we have no jurisdiction to review the hearing officer's decision.

Although the appeal cannot be formally considered, it does not appear that this has

resulted in depriving the claimant of relief to which he would otherwise be entitled. The record has been reviewed and the evidence supports the hearing officer's decision that claimant did not sustain an injury which arose out of and in the course and scope of employment on (date of injury).

Claimant testified that about an hour after he reported for work on an oil rig being worked by (employer), employer herein, on Friday, (date of injury), he smashed his left thumb between his tongs and those operated by another floor hand. Claimant said he removed his bloody glove and showed the injury to the floor hand and the "driller," who was claimant's supervisor. Claimant stated the supervisor took him to the "dog house" where the supervisor gave him two band-aids for the injury. Claimant testified he returned to work and worked the rest of the shift. After the shift claimant states he showed his smashed and cut thumb "to a man sitting on the back of a pickup whose name he does not recall" but who was later identified as (DS), the hearing officer refers to this individual as DS, a member of the night rig shift. The following Monday claimant testified he reported the injury to employer's personnel and safety coordinator, (Mr. S).

The driller on the job testified he was the supervisor on the rig in question. He stated that he remembered claimant working on the rig, that at no time did claimant ever approach him with an injury and that he did not supply claimant with any band-aids. The driller testified the first he knew of the injury was when Mr. S told him about it Monday, September 21st. Statements submitted from all the other members of claimant's crew indicate that none of them saw or heard anything that led them to believe claimant had suffered an injury. DS, the man on the tailgate, testified that he and claimant talked for 15 or 20 minutes but claimant did not mention an injury to his hand or appear to favor either hand or arm.

A radiology report dated 9-19-92 of claimant's lumbosacral spine reveals a normal back and does not mention claimant's thumb. There was no medical evidence in the file regarding a left hand or thumb injury.

As the hearing officer pointed out in his introduction of the case, the burden is on the claimant to prove his case. The factual determinations in this case depended largely on the credibility of the witnesses. The hearing officer saw and heard the witnesses, including the claimant. Article 8308-6.34(e) provides that the hearing officer is the sole judge of the weight and credibility to be given the evidence. The hearing officer can believe all, part, or none of any witness' testimony and resolve inconsistencies in the testimony of any witness. The hearing officer obviously chose not to believe claimant's version. There is sufficient evidence to support the hearing officer's determinations and decision.

In summary, the appeal was not timely filed, but, even if it were, it appears that the evidence supports the hearing officer's decision finding, in essence, that claimant has not sustained his burden of proving an injury to his left thumb on (date of injury).

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge